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No. 00-730

In The
SUPREME COURT OF THE UNITED STATES

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

RODNEY E. SLATER, Secretary of Department of Transportation, *et al*
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

BRIEF OF L. S. LEE, INC. *AMICUS CURIAE* ON BEHALF OF PETITIONER

Walter H. Ryland*
David H. Hallock, Jr.
Williams, Mullen, Clark & Dobbins
1021 E. Cary Street, 16th Floor
Richmond, VA 23219
(804) 783-6415
(804) 783-6507-FAX
Attorneys for Amicus Curiae
**Counsel of Record*

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QUESTIONS PRESENTED

1. Is numerical proportionality based on race a narrowly tailored remedy for societal discrimination?

2. Should the administration of the DBE program be enjoined as to both women-owned and minority owned businesses?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Interest of the Amicus Curiae 1

Statement of the Case 4

Summary of Argument 4

Reasons for Granting the Writ 5

I. Numerical Proportionality Based On Race Is Not A Narrowly Tailored Remedy For Societal Discrimination. 5

II. The SCC And The DBE Program Should Be Enjoined Both As To Women-Owned And Minority-Owned Disadvantaged Businesses. 11

Conclusion 13

TABLE OF AUTHORITIES

CASES — Page(s)

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ..... *passim*

Adarand Constructors, Inc. v. Slater, ___ U.S. 120 S.Ct. 722 (2000) 4

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir., 2000) ..... *passim*

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 12

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) ..... *passim*

Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902) 12

Fullilove v. Klutznick, 448 U.S. 448 (1980) ..... *passim*

Teachers v. Hudson, 475 U.S. 292 (1986) 9

United States v. Paradise, 480 U.S. 149 (1987) 6, 9

STATUTES

Small Business Act, § 8(d)(1), 15 USC § 637(d)(1) 5

15 USC § 644(g)(1) 12

OTHER

U.S. General Accounting Office Report
to Congressional Committees,
August, 1994, "Highway
Contracting, Disadvantaged
Business Program Meets Contract
Goal, But Refinements are Needed".
GAO/RCED-94-168 2

Appendix - The Compelling Interest For
Affirmative Action in Federal Procurement,
61 Fed. Reg. 26060 (1996) 4, 10, 11

INTEREST OF THE AMICUS CURIAE[1]

This brief is being filed on behalf of L. S. Lee, Inc. ("L. S. Lee"). L. S. Lee is a construction company doing business under its own name or related companies in New York, Delaware, Pennsylvania, Maryland, District of Columbia, Virginia, North Carolina and South Carolina. L. S. Lee is not owned by members of minority races or women who are eligible for certification as disadvantaged business enterprises (DBEs). The *amicus* does business as a contractor which installs guardrail and signs in the highway heavy construction industry and often offers to subcontract to general contractors on federally funded construction projects subject to DBE utilization programs. It is a common practice for general contractors to seek to fulfill the federally-mandated goals for DBEs by hiring minority specialty contractors. Thus non-DBE companies are disproportionately burdened in competing for sign and guardrail work on federally funded projects.

The outcome of this case is of particular interest to the *amicus* because of its exclusion from federal contracts as the result of contractors fulfilling their minority goals by hiring DBEs. As the United States General Accounting Office has documented:

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[1] This brief was authored by the *amicus* and counsel listed on its cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. This brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

States have generally obtained DBEs' participation through subcontracts let by prime contractors. The prime contractors are expected to meet the state's goal by subcontracting with DBEs. According to industry and state officials, DBEs tend to concentrate in specialty areas that are not capital intensive, such as landscaping, traffic control and construction and repair of signs and guardrails.

For example, with one exception, DBEs received 26 percent or more of the contract dollars awarded in each of these three areas in all four states [Colorado, Connecticut, Georgia, and Wyoming]. In each state, DBEs received 49 percent or more of the contract dollars awarded in at least two of the three areas. DBEs received 86 percent of the landscaping and 90 percent of the fencing and guardrail contract dollars in one state and 100 percent of the traffic control contract dollars in another. U. S. General Accounting Office Report to Congressional Committees, August, 1994, "Highway Contracting, Disadvantaged Business Program Meets Contract Goal, But Refinements Are Needed." GAO/RCED 94-168 at 11, 24.

The problem of exclusion of non-minority specialty contractors is enhanced as states increase their required goals to match the maximum availability of DBEs.

New DBE Goals published in the Maryland Register propose a 22.8% goal for Maryland State Highway Administration. US DOT size standards for DBEs are set at $16.6 million, a threshold significantly beyond the capability of the average guard rail specialty contractor.

North Carolina relies heavily on two women-owned business enterprise ("WBE") guardrail contractors who have participated in the program for many years, and do a majority of the available subcontract guardrail projects.

In the experience of this *amicus*, programs of numerical proportionality are not benign, but rather have a significant negative impact on non-DBE companies. In addition, there is no reliable evidence that numerical proportionality requirements in government contracts result in appreciable assistance to truly disadvantaged companies and provide no assistance to the disadvantaged.

Unfortunately, the record in this case is inadequate to permit an argument that the program at issue is not narrowly tailored by reason of its disproportionate impact on non-minority firms. But the disproportionate impact does impact the interests of this *amicus*.

The interest of the amicus is to protect similarly situated companies from (1) being excluded from government contract markets solely on the basis of race, and (2) to preserve a truly competitive environment in the construction industry in order to provide quality work at the lowest competitive cost.

The problems posed by the challenged program are not limited to the Small Business Act, but are representative of a proliferation of programs in federal procurement that have never received consideration by the legislative branch of government.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the case.

SUMMARY OF ARGUMENT

In *Adarand Constructors, Inc. v. Slater*, ___ U.S. ___, 120 S.Ct. 722 (2000) ("*Adarand VI*"), this Court remanded the case a second time for the lower courts to rule on the existence of a compelling interest and narrow tailoring of the remedy.

In answering both questions in the affirmative, the Court of Appeals relied on the sufficiency of the Report, "Appendix. The Compelling Interest For Affirmative Action In Federal Procurement," 61 Fed. Reg. 26060 (1996). ("The Compelling Interest"). Thus, the Court is in a position to rule whether the conclusions in "The Compelling Interest" justify "affirmative action" are sufficient to justify the Subcontractor Compensation Clause ("SCC") clause and its supporting programs.

The case also affords the opportunity for the Court to rule that no numerical proportionality program is a sufficiently necessary remedy for generalized discrimination.

To assure that the justification for affirmative action includes or permits a remedy of numerical

proportionality requires a showing of necessity which is not present here.

REASONS FOR GRANTING THE WRIT

I.

NUMERICAL PROPORTIONALITY BASED ON RACE IS NOT A NARROWLY TAILORED REMEDY FOR SOCIETAL DISCRIMINATION

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the Subcontractor Compensation Clause ("SCC"):

> The [SBA]...declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals,...shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality" and found that numerical proportionality requirements based on race in Federal contracts are narrowly tailored to remedy past societal discrimination App. at 65.

The *amicus* submits that it is not a permissible remedial purpose to create a system of race-based

preferences designed to achieve participation to the maximum practicable extent by race-designated companies in Federal contracting.

The Court of Appeals reached the conclusion that the programs at issue were narrowly tailored based on its analysis of the factors identified in *United States v. Paradise*, 480 U.S. 149 (1987). (App. 54-55).

However the Court failed to consider the first of the *Paradise* factors, the necessity for the relief. (App. 54). The Court of Appeals merely noted that in *Croson* this Court had criticized "proportionality" in the form of a "rigid numerical quota". (App. 55). The Court of Appeals then moved on to consider the other *Paradise* factors without addressing the lack of a logical nexus between mandating participation of DBE's to the full extent of their availability in the market and identified past discrimination.

In his dissenting opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Stevens noted the logical fallacy in a remedy based on proportional representation:

> "At best, the statutory preference is a somewhat perverse form of reparation for the members of the injured classes. For those who are the most disadvantaged within each class are the least likely to receive any benefit from the special privilege even though they are the persons most likely still to be suffering the consequences of the past wrong. A random distribution to a favored few is a poor form of compensation for an injury shared by many."

448 U.S. at 538-39 (Stevens, J., Dissenting).

The *amicus* is aware that Justice Stevens dissented in *Adarand III*, 515 U.S. at 242. That gives pause to any rush to cite Justice Stevens' opinion in *Fullilove*. Indeed, Justice Stevens distinguishes the program at issue in *Fullilove* as being more objectionable than the current one. 515 U.S. at 258 (Stevens, J., dissenting.) However, implicit in the Tenth Circuit's opinion and "The Compelling Interest" is the idea that if any race-conscious action is appropriate any remedy is appropriate, or at least a program of numerical proportionality. The *Fullilove* dissent is the most direct expression by any member of the Court of the need for a logical nexus between the remedy of numerical proportionality and the discrimination that some may have suffered. For this reason, the *amicus* suggests that this material be revisited.

Further, as Justice Stevens noted, the necessity for a remedial program of numerical proportionality is negated by several factors.

> "Assuming, however, that some firms have been denied public business for racial reasons, the instant statutory remedy is nevertheless demonstrably much broader than is necessary to right any such past wrong. For the statute grants the special preference to a class that includes (1) those minority-owned firms that have successfully obtained business in the past on a free competitive basis and undoubtedly are capable of doing so in the future as well; (2) firms that have never attempted to obtain any public business in the past; (3) firms that

were initially formed after the Act was passed, including those that may have been organized simply to take advantage of its provisions; (4) firms that have tried to obtain public business but were unsuccessful for reasons that are unrelated to the racial characteristics of their stockholders; and (5) those firms that have been victimized by racial discrimination.

Since there is no reason to believe that any of the firms in the first four categories had been wrongfully excluded from the market for public contracts, the statutory preference for those firms cannot be justified as a remedial measure. And since a judicial remedy was already available for the firms in the fifth category, it seems inappropriate to regard the preference as a remedy designed to redress any specific wrongs. In any event, since it is highly unlikely that the composition of the fifth category is at all representative of the entire class of firms to which the statute grants a valuable preference, it is ill-fitting to characterize this as a "narrowly tailored" remedial measure."

Id. at 540-41. (Footnotes Omitted.)

Adarand makes a compelling argument that the government has not identified discrimination with the specificity that justifies any race-based remedy. The necessity for any race-based "remedy" in this case is far less specifically identified than the hiring criteria

approved in *Paradise*[2] and reaffirmed in *Adarand III*, 515 U.S. 200, 237.

However, from the conclusion that some sort of race-conscious remedy might be permissible, it is a larger leap to justify the type of proportional representation approved by the Court of Appeals in this case. As this Court stated in *Adarand III*:

> ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with Justice Stevens that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, supra, at 533-535, 537. We think that requiring strict scrutiny is the best way to ensure

[2] *Paradise* involved a judicial remedy imposed on an offender, not a legislative enactment imposing a racial preference on the community at large. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large. *Teachers v. Hudson*, 475 U.S. 292, 309-10 n. 22 (1986).

> that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means.

Id., 515 U.S. at 326.

The Court of Appeals concludes that a race-based government program is narrowly tailored not through a detailed examination, but rather through deference to a government report which does not even examine the means of the results of proportional participation.

The program countenanced in *Fullilove* was described as a "temporary measure". 448 U.S. at 547-48 (Stevens, J., dissenting). This case has been in the courts for ten years. The government's response to this Court's decision in *Adarand III* was to issue the report upon which the Court of Appeals grounded its decision, "Appendix—The Compelling Interest for Affirmative Action in Federal Procurement, 61 Fed. Reg. 26050 (1996) ("The Compelling Interest"). This report semantically used such terms as "affirmative action" and use of race as a "factor" in public procurement, 61 Fed. Reg. at 26050, to justify by implication the remedial program of proportional participation at issue here. See Id. at 26062. Continuously, the report is silent on the need to include programs of proportional participation as acceptable affirmative action.

Experience has shown that no generalized definition of strict scrutiny by this Court is going to dissuade administrative agencies from implementing programs of proportional participation based on race. *Fullilove* in 1980, *Croson* in 1989, and *Adarand III* in 1996 have had no measurable influence on the universe of

government programs utilizing requirements for proportional participation.

The heavy reliance by the Court of Appeals on "The Compelling Interest" and its justification for "affirmative action" fails to justify a program of numerical proportionality.

II.

THE SCC AND THE DBE PROGRAM SHOULD BE ENJOINED BOTH AS TO WOMEN-OWNED AND MINORITY OWNED DISADVANTAGED BUSINESSES

The *amicus* suggests that the judgment should be reversed with final judgment ordered Adarand. The government articulated its findings in the record below. There is no suggestion that the program is remedial or narrowly tailored to affect a compelling interest.

The *amicus* have no objection to small business aid programs involving competitive bidding without racial classifications.

If the SCC and the DBE programs are enjoined only as to racial minorities, the effect will be to leave it in force as to women-owned DBEs ("WBEs"). Thus the governmental agency would still have a 5% statutory goal and a 12-15% DBE goal which would be satisfied primarily by women-owned businesses.

The *amicus* suggests that the WBE component of the statute is such an integral part of the program that it should be enjoined as part of the remedy fashioned by the court.

> If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.

Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902). Even when Congress has included a separability clause, the court eschews giving the statute "an effect altogether different from that sought by the measure viewed as a whole." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936).

Section 502 of the Small Business Act proscribes a minimum DBE participation goal of 5% of the total value of all prime contract awards. 15 U.S.C. § 644(g)(1). The participation minimum is expressed in the aggregate: Congress did not specify how much of the goal must be comprised of minority-owned versus women-owned business, but clearly contemplated a mixture of both. Because the participation goal has been expressed as an aggregate, and not distinctly allocated between minority-owned and women-owned businesses, the provisions of the SCC and DBE as they apply to racial minorities and women are interdependent, and must both be stricken if one is found unconstitutional.

CONCLUSION

For the foregoing reasons, the SCC and the administration of the small business DBE program of the Small Business Act should be declared unconstitutional and enjoined.

Respectfully submitted,

s/Walter H. Ryland

Walter H. Ryland*
David H. Hallock, Jr.
Williams, Mullen, Clark
& Dobbins
1021 E. Cary Street
Richmond, VA 23219
(804) 783-6415
(804) 783-6507-FAX
Attorneys for *Amicus Curiae*
*Counsel of Record